Queen's University Belfast Human Rights Centre Response to the ECCC Office of the Co-Investigating Judges' 'Call for Submissions by the Parties in Cases 003 and 004 and Call for Amicus Curiae Briefs'

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BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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INTRODUCTION

1. This submission is a response to the 'Call for Submissions by the Parties in Cases 003 and 004 and Call for Amicus Curiae Briefs' by the Co-Investigating Judges, which seeks clarification on whether, under customary international law applicable between 1975 and 1979, an attack by a state or organisation against members of its own armed forces may amount to an attack directed against a civilian population for the purpose of Article 5 of the ECCC Law.

2. Our position is that an attack in such a situation *can* constitute an attack under Article 5. We shall show this primarily through an examination of the case law following World War Two, in order to establish customary international law applicable between 1975 and 1979. We shall also consider recent developments in modern international criminal courts. We have three main arguments:

1. Customary international law applicable between 1975 and 1979 recognised persecution on political, racial or religious grounds as a crime against humanity regardless of whether the victims were considered civilians;
2. Customary international law applicable between 1975 and 1979 recognised that members of the armed forces could constitute civilians for the purposes of crimes against humanity, where the crimes occurred in a systematic manner in line with a state policy; and
3. International criminal law continues to acknowledge that attacks against members of the armed forces may amount to crimes against humanity.

PERSECUTION AS CRIMES AGAINST HUMANITY

3. Under the Nuremberg Charter[1] and Control Council Law No. 10,[2] crimes against humanity are defined as:

> *… murder, extermination enslavement, deportation, imprisonment, torture, rape or other inhuman acts committed against any civilian population* ***or***

[1] UN, *Charter of the International Military Tribunal, Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis*, 8 August 1945, Article 6(c).
[2] *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity*, 20 December 1945, Article II.

> *persecution on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated.*

4. It can be seen that the second category contains no reference to a civilian population. This distinction has been widely recognised within the post-World War Two jurisprudence, which has identified two categories of crimes against humanity: i) acts against civilian populations, and ii) persecution on political, racial, or religious grounds.

5. In relation to the second ground, case law supports the conclusion that in a situation where the state is engaging in inhumane acts and persecution on political, racial, or religious grounds, there is no requirement that the victims be civilians.[3] As stated in the French Cour de Cassation *Barbie* decision:

> *it is the intention of the perpetrator of the crimes and not the quality or motives of the victims that determine the nature of the persecution committed … n**either the victims' motives nor their classification as combatants could exclude the guilty intent** giving rise to Crimes against Humanity which shall be prosecuted… Crimes against Humanity include inhumane acts and persecutions committed in a systematic manner against people belonging to a particular race or religious community in the name of the State which is carrying out its policy of ideological hegemony … including inhumane acts and **persecutions committed against adversaries of this policy, no matter what form this opposition may take.**[4]

This position subsequently received support from the Cour d'appel de Paris in the *Touvier* case, where it was found that:

> *Jews and members of the Resistance persecuted in a systematic manner in the name of a state practising a policy of ideological supremacy, the former by reason of their membership of a racial or religious community, the latter by*

[3] *Case No. 35 (The Justice Trial: Trial of Josef Altstötter and Others)*, UNWCC, 30 November 1947; *In re Pilz. Holland*, District Court of The Hague (Special Criminal Chamber), 21 December 1949; Special Court of Cassation, 5 July 1950.
[4] Jean-Olivier Viout. (1999) 'The Klaus Barbie Trial and Crimes against Humanity' *Hofstra Law & Policy Symposium* 3: 155-166.

> *reason of their opposition to that policy, can equally be the victims of crimes against humanity.*[5]

6. Such crimes can be perpetrated by the state against the state's own nationals. For example, in *Josef Altstötter and Others*, it was noted that 'acts by Germans against German nationals may constitute crimes against humanity'. [6] Indeed, it has been observed that 'the concept of crimes against humanity was introduced chiefly with a view to punishing offences committed against nationals of the enemy States themselves, such as in the case of German Jews, German Catholics and other Germans victimised on account of their race, religion or political creed.'[7]

7. Support for a focus on persecution, regardless of the status of the victim, comes from the 1947 Conference for the Unification of Penal Law, which focused predominantly on the existence of persecution. Its Resolution, drafted by some of the 'best jurists in the world',[8] proposed a definition of crimes against humanity which removed the concept of 'civilians', and instead specified that:

> *Any manslaughter, or act which can bring about death, committed in peace time as in war time, against individuals or groups of individuals, because of their race, nationality, religion or opinions, constitutes a crime against humanity and must be punished as murder.*[9]

8. In his recent commentary on the customary international law of crimes against humanity, Cassese noted that as 'no mention is made of the possible victims of persecutions, or rather, as it is not specified that such persecutions should target "any civilian population", the inference is warranted that not only any civilian group but also members of the armed forces may be the victims of this class of crime.'[10] He concluded that:

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[5] *Republic of France v Paul Touvier*, Cour d'appel de Paris, 13 April 1992, 352.
[6] *Josef Altstötter and Others*, n.3.
[7] Notes on *Trial of Wilhelm Gerbsh*, The Special Court in Amsterdam, First Chamber, 28 April 1948, *Law Reports of Trials of War Criminals* (Vol. XIV) (Forward).
[8] Joseph Y. Dautricourt (1949-1950). 'Crime Against Humanity: European Views on Its Conception and Its Future' *Journal of Criminal Law and Criminology* 40: 170.
[9] Resolution of the VIII Conference for the Unification of Penal Law, Brussels, 10th and 11th July, 1947.
[10] Antionio Cassese, *International Criminal Law* (2nd ed) (Oxford University Press, 2008), 118.

> *Plainly, in times of peace military personnel too may become the objects of crimes against humanity at the hands of their own authorities. By the same token, in times of armed hostilities,* ***there is no longer any reason for excluding servicemen, whether or not ford de combat (wounded, sick, or prisoners of war),*** *from protection against crimes against humanity (chiefly persecution), whether committed by their own authorities, by allied forces, or by the enemy.*[11]

9. We acknowledge that Article 5 does not contain a distinction between acts against civilians and persecution. However the Article's inclusion of '*on national, political, ethnical, racial or religious grounds'* retains the goal of prosecuting persecution, and should therefore be interpreted as including inhumane acts perpetrated against members of the armed forces based on national, political, ethnical, racial or religious grounds.

COMBATANTS AS 'CIVILIANS'

10. The first category of offences under the Nuremberg Charter and Control Council Law No. 10: 'acts against civilian populations', were initially intended to refer to persons other than combatants. However, after World War Two courts began to adopt a liberal interpretation of the term 'civilians',[12] with courts focusing instead whether the crimes were conducted in a systematic manner in line with a state policy.

11. For example, in the case of *R. (StS 19/48),*[13] the Supreme Court for the British Occupied Zone found that denouncing a non-commissioned officer in uniform and member of the Nazi Party and the SA for insulting the leadership of the party could constitute a crime against humanity, as long as it could be demonstrated that the agents intention was to hand over the victim to the 'uncontrollable power structure of the party and State', knowing that as a consequence, the victim was likely to be caught up in an arbitrary and violent system.[14] Similarly, in *P. and others*, five members of a Court Martial were found guilty of complicity in a crime against humanity for their role in executing three German marines who tried to escape from Denmark following Germany's partial capitulation. The Court noted that:

[11] *Ibid*, 122.
[12] *Ibid*, 118-119.
[13] *Case of R. (StS 19/48*), Supreme Court for the British Occupied Zone, *27 July 1948*
[14] *Ibid*, 47.

> *Whoever notes the expressly emphasized illustrative character of the instances and classes of instance mentioned there [Article II(1)(c) of the Control Council Law No.10],* ***cannot come to the conclusion that action between soldiers may not constitute crimes against humanity.*** *[Admittedly], a single and isolated excess would not constitute a crime against humanity pursuant to the legal notion of such crimes. [However], it has already been shown that the action at issue can belong to the criminal system and criminal tendency of the Nazi era.*[15]

In the *H. case*, the same Court found that a judge who had sentenced to death two officers of the German Navy could be held guilty of crimes against humanity to the extent that his action was undertaken deliberately in connection with the Nazi system of violence and terror.[16] The Cour de Cassation took a similar approach in *Barbie*, overruling the lower court's finding that Barbie could not be charged with crimes against humanity perpetrated against Professor Gompel, because it was 'not clear whether Professor Gompel has been arrested in his capacity as a Jew or in his capacity as a member of the Resistance.' The Court found that:

> *Whereas, what constitutes crimes imprescriptible against humanity…[includes]* ***the inhumane acts and the persecutions which, in the name of a State practicing a hegemonic political ideology, have been committed in a systematic fashion, not only against persons because they belong to a racial or religious group, but also against the adversaries of this [State] policy****, whatever form their opposition…and whereas neither the mental intent of the victims****, nor the possibility that they were combatants,*** *could exclude the existence, on the defendant's part, of the mental intent required for the infraction pursued, the Indicting Chamber has misunderstood the scope and meaning of the law.*[17]

Thus, the status of victims of crimes against humanity has repeatedly been found to be irrelevant, where the crimes were perpetrated in the context of states practising hegemonic political ideologies enforced through arbitrary and violent systems. To the extent that such

[15] *P. and others*, Germany, Supreme Court in the British Occupied Zone, 7 December 1948, 228.
[16] *H. case*, Germany, Supreme Court in the British Occupied Zone, 18 October 1949, 233-234, 238, 241-4.
[17] Leila Sadat Wexler (1994-1995). 'The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again' *Columbia Journal of Transnational Law*, 32: 289-380, 342.

incidences would satisfy the widespread and systematic requirement, Article 5 of the ECCC could be broadly interpreted, allowing for members of the armed forces to be victims of an attack for the purposes of the Article.

FROM CIVILIANS TO *HORS DE COMBAT*

12. While not directly relevant to the status of customary international law between 1975 and 1979, it is worth noting that subsequent jurisprudence does not exclude members of the armed forces from being considered victims of crimes against humanity. Although contemporary courts have not addressed the specific issue considered in this submission, some guidance can be found in their jurisprudence on similar issues.

13. The International Criminal Court (ICC), International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) have opined that a 'targeted population must be of a predominantly civilian nature. The presence of certain non-civilians in their midst does not change the character of the population'.[18] This is asserted in *Prosecutor v. Germain Katanga*, where the ICC held that, 'the crime may be established even if the military operation also targeted a legitimate military objective. It is important, however, to establish that the primary object of the attack was the civilian population or individual civilians'.[19]

14. However, the jurisprudence from these tribunals has been consistent in stating that, 'there is no requirement nor is it an element of crimes against humanity that the victims of the underlying crimes be 'civilians'".[20] In *Prosecutor v. Kupreškíc* the ICTY held that, 'those actively involved in a resistance movement can qualify as victims of crimes against humanity',[21] and in the *Prosecutor v Mrkšić and Šljivančanin* case, the appeal chamber overruled the trial chamber's holding that the underlying victims of a crime against humanity must be civilian, stating that the trial chamber had erroneously created an additional requirement.[22] Indeed, recent case law suggests that these tribunals are adopting a broad

[18] *The Prosecutor v Tadić* (IT-94-1-T) 7 May 1997, para 638; *The Prosecutor v Blaškić* (IT-95-14-A) 29 July 2004, para 114-115; *The Prosecutor v Kordić & Čerkez* (IT-95-14/2-A) 17 December 2004, para 50 and 97; *The Prosecutor v Galić,* (IT-98-29-A) 30 November 2006, para 136-137; *The Prosecutor v Akayesu* (ICTR-96-4-T) 2 September 1998, para 582, n. 146; *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05 -01/08) 21 March 2016, para 153; *The Prosecutor v. Germain Katanga* (ICC-01/04-01/07) 7 March 2014, para, 802.
[19] *Katanga*, *ibid*, 802.
[20] *The Prosecutor v Mrkšić and Šljivančanin*, (IT-95-13/1-A) 5 May 2009, para 32; *The Prosecutor v Popović et al.* (IT-05-88-A) 30 January 2015, para 773; *Bemba,* n.18, para 155.
[21] *The Prosecutor v. Kupreškíc* (IT-95-16-T) 14 January 2000, para. 549.
[22] *Mrkšić and Šljivančanin*, n.18, para. 33.

interpretation of the term 'civilian', which incorporates *hors de combat*. At the ICTR, it was held that the reliance on combatant/civilian distinction from international humanitarian law and war crimes misapplies the nature of crimes against humanity. For example, in the military cases where 10 Belgian peacekeepers were captured by the Rwandan army, beaten and executed, it did not matter that one of them had obtained a weapon to use in self-defence before they were killed, as it did not change their vulnerable status and the attack against them forming part of a larger crime against humanity.[23] The question of whether they were civilians or not was irrelevant, instead the focus was on whether they could be classified as combatants or not.

15. As such, it can be seen that the tribunals have acknowledged that looking at the distinction as between combatants and civilians does not capture all *hors de combat.* When it comes to crimes against humanity, *hors de combat* (as a more adaptive reading of civilians) better encapsulates the underlying vulnerability and egregiousness of crimes where *hors de combats* are massacred on masse. Accordingly victims of crimes against humanity are not 'unified metaphysical entities', but a group of identified individuals who are vulnerable from being targeted as part of a plan or policy to have their personal integrity and dignity attacked.[24]

CONCLUSION

16. This brief submission has established that from 1975-1979, customary international law recognised that members of armed forces could be subjected to crimes against humanity, in cases where they were subject to persecution, and in cases where the crimes were perpetrated on behalf of a broader state policy through structures of violence. Such crimes could be perpetrated by states against their own nationals. While more recent case law has considered that the victims of crimes against humanity must be predominantly civilian, it does not exclude members of armed forces from being considered victims, and indeed begins to show a broad interpretation of the term 'civilian'.

17. M. Cherif Bassiouni has identified the modern law on crimes against humanity as containing two common features:

[23] *The Prosecutor v. Théoneste Bagosora et al.* (ICTR-98-41-T) 18 December 2008, paras.2175 and 2239; and *Prosecutor v Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye, Innocent Sagahutu* (ICTR-00-56-T) 11 May 2011, paras. 2095-96 and 2140.
[24] David Luban (2004). 'A Theory of Crimes Against Humanity' *Yale Journal of International Law* 29:1, 85-167, 97.

> *(1) they refer to specific acts of violence against persons irrespective of whether the person is a national or non-national and irrespective of whether these acts are committed in time of war or time of peace, and (2) these acts must be the product of persecution against an identifiable group of persons irrespective of the make-up of that group or the purpose of the persecution. Such a policy can also be manifested by the 'widespread or systematic' conduct of the perpetrators, which results in the commission of the specific crimes contained in the definition.*[25]

18. Thus, it can be seen that the customary law of crimes against humanity does not preclude attacks against armed forces from constituting such crimes. Criminalisation of crimes against humanity arose to protect individuals who are left vulnerable to abuses from those in power.[26] More symbolically these crimes penalise the egregious disregard for human spirit, life, integrity and dignity that shocks the conscious of humanity.[27] An interpretation of Article 5 which allows an attack by a state or organisation against members of its own armed forces to amount to an attack directed against a civilian population is in keeping with the overall purpose of international criminal law and international humanitarian law, to promote a broad scope of protection of the basic values of human dignity, regardless of the legal status of those entitled to such protection.[28] As such, the breadth of the 'civilian population' requirement becomes a lower threshold to establish when construed against other elements in the *chapeau* of the crime.

[25] M. Cherif Bassiouni, 'Crimes Against Humanity' available at www.crimesofwar.org/a-z-guide/crimes-against-humanity/#sthash.aOwRmBrM.dpuf
[26] Luban, n.24, 101 fn.59.
[27] Hansdeep Singh (2009). 'Critique of the Mrkšić Trial Chamber (ICTY) Judgment: A Re-evaluation on Whether Soldiers Hors de Combat Are Entitled to Recognition as Victims of Crimes Against Humanity' *The Law and Practice of International Courts and Tribunals* 8, 247-296.
[28] See *Kupreškíc et al*., n.21, pars. 547–549; *Prosecutor v Jelisíc* (IT9510T) 14 December 1999, para. 54.